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Supreme Court, U.S.
FILED
AUG 30 2001
OFFICE OF THE CLERK

No. 00-1824

IN THE

# Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
*Petitioners*,

v.

THOMAS C. FULKERSON AND DOLLY S. FULKERSON,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITIONERS' REPLY MEMORANDUM

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## REASONS FOR GRANTING THE WRIT

### I. THIS CASE IS RIPE FOR REVIEW.

Respondents assert that this case is not yet ripe for review because there are other issues in the case that may require resolution on remand. Contrary to Respondents' assertion, this Court has granted petitions for a writ of certiorari notwithstanding the fact that a court of appeals had remanded the case to a district court. Further, this Court grants petitions for a writ of certiorari to resolve legal questions worthy of review not, as Respondents assert, to resolve all of the issues in a particular case.

The Petition for a Writ of Certiorari (the "Petition") seeks review of two legal questions. First, the Petition requests that this Court resolve the question of the appropriate standard for determining status as a "trade or business" under 29 U.S.C. § 1301(b)(1). Second, the Petition requests that this Court resolve the question of whether the holding of a lease over many years can be considered in determining "trade or business" status under 29 U.S.C. § 1301(b)(1). The Seventh Circuit's determination of these legal questions will not be affected by the proceedings on remand. This Court has on numerous occasions granted a petition for a writ of certiorari where the court of appeals has remanded the case. *See, e.g.*, *Seling v. Young*, 531 U.S. 250, ___, 121 S. Ct. 727, 733 (2001) (Court granted certiorari in case that had been remanded by the Ninth Circuit for an evidentiary hearing); *Whitman v. American Trucking Ass'n*, 531 U.S. 457, ___, 121 S. Ct. 903, 907 (2001) (Court granted certiorari in case that had been remanded by the District of Columbia Circuit to EPA). Further, this Court has on numerous occasions granted certiorari where the resolution of the questions presented would not resolve the entire case. *See, e.g.*, *Glover v. United States*, 531 U.S. 198, 205, 121 S. Ct. 696, 701 (2001) (court of appeals to address on remand issues outside of questions presented in petition).

The cases cited by Respondents are not to the contrary. In *Brotherhood of Locomotive Fireman & Engineermen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 88 S. Ct. 437 (1967) (*per curiam*), this Court held that a case was not yet ripe for review because it had been remanded by the court of appeals to the district court for a determination as to whether a contempt had, in fact, occurred. In that case, the proceedings on remand might have had an effect on the questions presented because a finding of no contempt on remand would moot the questions presented. Similarly, in *Virginia Military Institute v. United States*, 508 U.S. 946, 113 S. Ct. 2431 (1993) (Scalia, J.), the proceedings on remand were to determine an appropriate remedy and the choice of remedy might have had a bearing on the questions presented.

Here, in contrast, the proceedings on remand will not have an effect on the questions presented. The determination of the legal question as to the appropriate standard for determining "trade or business" status has already been made. Further, the Seventh Circuit has already made the determination that the continuous holding of a lease over a number of years cannot be considered as a matter of law in determining "trade or business" status. Therefore, the case is ripe for review because neither question presented will be affected by the proceedings on remand.

## II. THE QUESTIONS PRESENTED IN THE PETITION ARE QUESTIONS OF LAW NOT DEPENDENT UPON THE PARTICULAR FACTS OF THIS CASE.

Respondents contend that review of this case is unwarranted because of the allegedly fact specific nature of this case. However, resolution of the legal questions presented by the Petition is not limited to the particular fact pattern at issue in this case. The first question presented asks this Court to determine the appropriate standard for determining "trade or

business" status under 29 U.S.C. § 1301(b)(1). This standard will apply to *every* "trade or business" determination made under the statute.

The second question asks this Court to determine whether the continuous holding of a lease over a number of years may be considered in determining "trade or business" status. As the numerous cases cited on pages 20 through 22 of the Petition attest, this is a recurring legal issue of applicability to *all* cases involving leases in the "trade or business" context. The Seventh Circuit did not hold, as Respondents would imply, that the holding of a lease *under these particular facts* could not be considered as a matter of law in determining whether conduct is "continuous and regular" (and so, in the Seventh Circuit's view, constitutes a "trade or business"). Rather, the Seventh Circuit held that the holding of a lease could *never* be considered in making the "continuous and regular" determination. Thus, contrary to Respondents assertion, the resolution of these legal questions will have a broad impact well beyond this particular case.

## III. THE SEVENTH CIRCUIT'S RELIANCE ON *GROETZINGER* AS PROVIDING THE PLAIN MEANING OF "TRADE OR BUSINESS" IS MISPLACED.

Respondents contend that the Seventh Circuit relied on this Court's well-established plain meaning jurisprudence in determining the meaning of "trade or business" in 29 U.S.C. § 1301(b)(1). However, Petitioners never contended that the Seventh Circuit should have disregarded the alleged plain meaning of 29 U.S.C. §1301(b)(1). Rather, Petitioners contend that the Seventh Circuit erred in holding that "trade or business" has a plain meaning.

In support of its determination that "trade or business" has a plain meaning, the Seventh Circuit relied upon this Court's decision in *Commissioner v. Groetzinger*, 480 U.S. 23, 107

S. Ct. 980 (1987). However, as discussed in detail in the Petition at pages 14 through 15, *Groetzinger* acknowledged that there is no definition of the phrase "trade or business" nor a broadly applicable judicial definition. Further, *Groetzinger* cautioned that the standard articulated in that case should not be taken out of context of the particular section of the Internal Revenue Code involved in that case.

Instead of first determining whether the application of *Groetzinger*'s "trade or business" was appropriate outside of the particular context of that case, the Seventh Circuit instead first determined that *Groetzinger*'s standard provided the plain meaning of "trade or business" for all contexts (despite *Groetzinger*'s counsel to the contrary). Once the Seventh Circuit held that the *Groetzinger* standard provided the plain meaning of "trade or business," the Seventh Circuit was free to disregard the purpose behind the statute of preventing the fractionalization of assets of the withdrawn employer. As the Seventh Circuit stated:

> Central States is correct that [preventing fractionalization] was a policy behind MPPAA, but knowing what the policy is tells us little about how far it should extend. MPPAA, like much other legislation, is a compromise embodying competing purposes and is intended to effectuate certain policies only to a restricted degree. The only way in which we can determine the boundaries on these policies is by examining the statutory language. This explains why we have in the past rejected policy-based interpretations of MPPAA that did not find support in the text. Congress demarcated the extent to which the anti-fractionalization policy would be pursued in the text of the MPPAA, such as by not imposing personal liability on shareholders, as explained above. The provision imposes liability only on "trades or businesses," and those words must be given their ordinary meaning in accordance with established canons of interpretation.

*Central States, S.E. & S.W. Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 896-97 (7th Cir. 2001). The Seventh Circuit may be correct that it is difficult to determine how far the statutory policy should extend. However, it is not difficult to determine that it should extend to the situation where truck terminals owned by the withdrawing employer are transferred (*i.e.*, fractionalized) to the owners of the withdrawing employer for leasing. Only by claiming that the phrase "trade or business" has a plain meaning (when it does not) can the obvious fractionalization at issue in this case be disregarded.

Ironically, the Seventh Circuit did not hesitate to consider the *lack* of fractionalization in a case decided subsequent to the filing of the Petition. *Central States, S.E. & S.W. Areas Pension Fund v. White*, No. 00-2812, 2001 WL 818782 (7th Cir. July 20, 2001). In comparing the *White* case to the *Fulkerson* case, the Seventh Circuit had this to say:

> In nearly every way, the Whites' conduct resembles that of the Fulkersons, from the manner of depositing rent checks to the tax treatment of the rental income and expenses. While the Whites performed *more* upkeep, such as maintaining the property and performing routine repairs and cleaning, *this involvement is not legally significant*. . . . The Whites' activities, *however extensive*, in the upkeep and maintenance of their investment in their primary residence were personal in nature, and as such, do not rise to the level of a trade or business.

*Id.* at *6 (emphases added). Thus, despite the fact that the Whites' engaged in more activity than the Fulkersons, the Seventh Circuit held that the activities in renting garage apartments did not amount to a "trade or business" as a matter of law.

The Seventh Circuit went on to explain its reasoning in a way that makes it clear that, even within the Seventh Circuit itself, there is a conflict in the standard being applied to determinations of "trade or business" status:

> Our conclusion that the Whites' rental activity does not amount to a trade or business *furthers Congress' purpose* in enacting the statute. "Congress enacted sec. 1301(b) in order to prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities . . . ." Here, the Whites' rental activity has absolutely no possibility of being used to dissipate or fractionalize Jones Transfer's corporate assets and thus avoid withdrawal liability. . . . A law with the *sound purpose of preventing fractionalization* should not be stretched to such an extreme application that would expose a common owner of a completely unrelated personal business to such withdrawal liability. The Whites' two apartments *did not offend Congress' purpose* designed to prevent businesses from shirking their ERISA obligations. . . .

*Id.* at *6 (quoting *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1013 (9th Cir. 1987)) (citations omitted) (emphases added).

In this case, the Seventh Circuit relied on the level of activity, and not fractionalization, in making the "trade or business" determination. However, in *White*, the Seventh Circuit held that it was the lack of fractionalization that mattered despite the fact that the level of activity in *White* was greater than the level of activity in this case. These two holdings are contradictory. Either the statute's anti-fractionalization purpose must be considered in making the "trade or business" determination (meaning that the Court erred here in disregarding the fractionalization in favor of the alleged plain meaning of "trade or business") or the purpose cannot be considered (meaning that the activities in *White* were at least sufficient for a factfinder to conclude that they amounted to a "trade or business").

## IV. THERE IS A CIRCUIT CONFLICT REGARDING THE "TRADE OR BUSINESS" STANDARD.

Respondents contend that the District of Columbia Circuit's decision in *Connors v. Incoal, Inc.*, 995 F.2d 245 (D.C. Cir. 1993), is in agreement with the Seventh Circuit in applying the *Groetzinger* test. Although in *Connors* the District of Columbia Circuit used the *Groetzinger* test, *Connors* did not involve leasing. Further, there is a conflict between the Seventh Circuit and the District of Columbia Circuit. Although the Seventh Circuit acknowledged in *Central States, S.E. & S.W. Areas Pension Fund v. White*, No. 00-2812, 2001 WL 818782 (7th Cir. July 20, 2001), that no economic nexus is required for a "trade or business" to be under common control, 2001 WL 818782, at *3, the Seventh Circuit went on to require an economic nexus *sub silentio.* That is, the Seventh Circuit stated that a "completely *unrelated*" business should not be exposed to withdrawal liability. 2001 WL 818782, at *6 (emphasis added). To the extent *White* requires that there be some economic relationship beyond common control, *White* conflicts with the District of Columbia Circuit's decision in *Connors* wherein the District of Columbia Circuit held that "there is *no* economic nexus requirement that an enterprise must meet in order to qualify as a 'trade or business.' Indeed, it is not even *relevant*, let alone dispositive, that there is, or is not, an economic nexus . . . ." *Id.* at 254 (emphases in original). Similarly, the Seventh Circuit states in this case that no economic nexus is required. However, there is simply no way to distinguish this case from the Seventh Circuit's decisions in *Central States, S.E. & S.W. Areas Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992), *Central States, S.E. & S.W. Areas Pension Fund v. Koder*, 969 F.2d 451 (7th Cir. 1992), and *Central States, S.E. & S.W. Areas Pension Fund v. Ditello*, 974 F.2d 887 (7th Cir. 1992), wherein the Seventh Circuit found that leasing itself constituted a "trade or business" without imposing *any* additional activity require-

ment beyond the leasing itself. The only distinction between this case and *Slotky*, *Koder*, and *Ditello*, is that in those cases the property was leased to the withdrawn employer, not another party. Thus, the Seventh Circuit seems to be imposing an economic nexus requirement *sub silentio* or at the very least considering the economic relationship relevant. This is in direct conflict with the District of Columbia Circuit which held that an economic nexus, or lack thereof, is not even relevant. *Connors*, 995 F.2d at 254.

Additionally, Respondents contend that there is no conflict between the Seventh Circuit's decision in this case and the Ninth Circuit's decision in *Board of Trustees of the Western Conference of Teamsters Pension Fund v. Lafrenz*, 837 F.2d 892 (9th Cir. 1988), because the Ninth Circuit in *Lafrenz* did not follow *Groetzinger* in holding that leasing equipment was a "trade or business" despite the argument in that case that the leasing amounted to a "passive investment." Actually, the fact that the Ninth Circuit in *Lafrenz* did *not* follow *Groetzinger* highlights the conflict between the Seventh Circuit and the Ninth Circuit. In *Lafrenz*, the Ninth Circuit explained that the statute at issue was enacted to prevent fractionalization. *Id.* at 894. Because the leased trucks in that case were used as part of the operations of the withdrawn employer, the Ninth Circuit held that the leasing constituted a "trade or business" notwithstanding the fact that the Lafrenzs' contended that the leasing was a "passive investment." *Id.* at 894-95. Here, the Seventh Circuit did not consider the fact that the terminals at issue were built by the withdrawn employer and transferred (fractionalized) to the Fulkersons in making the "trade or business" determination. The fact that the Respondents disagree with the holding in *Lafrenz* does not eliminate the conflict between *Lafrenz* and the Seventh Circuit's holding in this case.

Lastly, Respondents contend that the Eighth Circuit's decision in *Vaughn v. Sexton*, 975 F.2d 498 (8th Cir. 1992), does not conflict with the Seventh Circuit's decision in this case

because, according to Respondents, the Eighth Circuit applied the *Groetzinger* analysis. Although the Eighth Circuit in *Vaughn* did mention "continuous and regular" in the case, the mention was made in the context of explaining the defendants' argument in that case. *See Vaughn*, 975 F.2d at 503 ("defendants also argue that its income-generating activities were not continuous and regular enough to amount to the acts of a trade or business"). The Eighth Circuit did not state that it was adopting "continuous and regular" as the appropriate test nor did it cite to *Groetzinger*. Instead, the Eighth Circuit stated:

> The cases interpreting the meaning of "trade or business" under ERISA have held the following fact patterns to have established the existence of a trade or business liable under the law: vehicle leasing operations conducted for profit; vehicle and real property leases between two entities under common control; and the subsistence of one commonly controlled entity, directly or indirectly, partly or entirely, upon the revenues generated by a second commonly controlled entity. In this case, it is undisputed that the trust, established in 1980, had leased real property in 1986 and 1987 to [the withdrawn entity]. Without addressing the question of when those activities occurred, the trial court held that such undisputed facts established the existence of a trade or business for ERISA purposes. If the question of the timing of the trust's activities is not a consideration, we agree with that legal conclusion.

*Id.* at 503. Thus, contrary to Respondents' assertion, the Eighth Circuit did consider whether the facts amounted to fractionalization and did not look to any actual physical activity beyond the fact that the trust leased real property to the withdrawn employer over a period of two years. This is in direct conflict with the Seventh Circuit's approach in this case which did not consider the fractionalization involved and held that the leasing itself could not be considered as a matter of law.

The split in the circuits warrants review by this Court. The differing and confusing standards applied by the circuit courts makes it impossible to determine what constitutes a "trade or business" under 29 U.S.C. § 1301(b)(1). This, in turn, engenders continuing litigation because as fiduciaries under ERISA, pension plan trustees have a duty to collect all withdrawal liability due to the plan. In the absence of controlling guidance by this Court, fiduciaries will be compelled to litigate the issue. Further, persons and entities that may be subject to withdrawal liability are unclear as to the scope of activity that may constitute a "trade or business." Under these circumstances, a clear statement from this Court is required concerning the standard for determining what constitutes a "trade or business" under MPPAA.

## CONCLUSION

For the reasons stated herein and in the Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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